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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

RAUL ROJO GARCIA,

Defendant and Appellant.

D075974

(Super. Ct. No. SCN186475)

APPEAL from an order of the Superior Court of San Diego County,

Timothy M. Casserly, Judge. Affirmed.

Arthur Martin, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Eric A. Swenson and Charles C. Ragland, Deputy Attorneys General, for Plaintiff and Respondent.

I.

INTRODUCTION

In 2005, a jury found Raul Rojo Garcia guilty of murder (Pen. Code, § 187)¹ (count 1) and fixed the degree of the murder as second degree. The jury also found true several firearm enhancements (§ 12022.53, subds. (b), (c) & (d)). The trial court sentenced Garcia to 40 years to life in prison, consisting of a sentence of 15 years to life on the second degree murder conviction² and a consecutive sentence of 25 years to life for the section 12022.53, subdivision (d) firearm enhancement.³

In March 2019, Garcia filed a motion for modification of sentence pursuant to section 1170.91.⁴ The trial court entered an order denying Garcia's motion.

¹ Unless otherwise specified, all subsequent statutory references are to the Penal Code.

² Section 190, subdivision (a) provides, subject to exceptions not applicable in this case, "every person guilty of murder in the second degree shall be punished by imprisonment in the state prison for a term of 15 years to life."

³ Section 12022.53, subdivision (d) provides in relevant part: "Notwithstanding any other provision of law, any person who, in the commission of a felony specified in subdivision (a) [including murder], . . . personally and intentionally discharges a firearm and proximately causes great bodily injury, as defined in Section 12022.7, or death, to any person other than an accomplice, shall be punished by an additional and consecutive term of imprisonment in the state prison for 25 years to life."

⁴ Section 1170.91, subdivision (a) creates a mechanism for a trial court to consider mental health and substance abuse problems stemming from military service as a mitigating factor when imposing a determinate term under section 1170, subdivision (b). Section 1170.91, subdivision (b) permits a person "to request resentencing pursuant to subdivision (a)," under certain circumstances.

On appeal, Garcia acknowledges that he is not eligible for resentencing pursuant to section 1170.91 because section 1170.91 applies only to *determinate* sentences and not to *indeterminate* life sentences, such as the one that he is currently serving. Nevertheless, he "requests his case be remanded . . . so he can request the court exercise its discretion under section 12022.53, subdivision (h),⁵ to strike one or more of the gun use enhancements attached to his sentence."

We affirm the trial court's order denying Garcia's motion and deny his request for a remand.

II.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Garcia's second degree murder conviction and sentence*

As outlined in part I, *ante*, in 2005, a jury found Garcia guilty of second degree murder (§ 187) and found true three firearm enhancement allegations. (§ 12022.53, subds. (b), (c) & (d).) At sentencing, the trial court imposed an aggregate sentence of 40 years to life in prison, consisting of a sentence of 15 years to life for the second degree murder conviction and a consecutive sentence of 25 years to life for the section 12022.53, subdivision (d) firearm use enhancement. The court stayed execution of the sentences on the remaining firearm enhancements.

⁵ Effective January 1, 2018, section 12022.53, subdivision (h) was amended to allow a trial court to exercise its discretion under section 1385 to strike or dismiss a firearm enhancement at sentencing under section 12022.53.

B. *Garcia's motion for modification of sentence*

In March 2019, Garcia, acting in propria persona, filed a motion to modify his sentence pursuant to section 1170.91. In his motion, Garcia stated that he had been diagnosed with "compound PTSD [post-traumatic stress disorder]." Garcia stated that his PTSD "existed prior to [his] crime, but it was never considered during [his] trial." The remainder of Garcia's motion detailed a series of traumatic events that Garcia stated had occurred in his life.

C. *The trial court's order denying Garcia's motion*

The trial court issued a minute order denying Garcia's motion on April 4, 2019.

D. *Garcia's appeal*

Garcia timely appealed the trial court's order denying his motion for modification of sentence.⁶

⁶ The People contend that the trial court's order is not appealable. The People argue that Garcia "concedes the trial court had no authority to grant his motion." Thus, the People contend that the denial of Garcia's motion for modification of sentence did not affect Garcia's substantial rights. (See § 1237 [providing that criminal defendant may appeal "[f]rom any order made after judgment, affecting the substantial rights of the party"].) We disagree.

While Garcia concedes that he was ineligible for resentencing under section 1170.91, he maintains that "[u]pon receipt of [his] motion for resentencing, the [trial] court had discretion to strike one or more of the gun use enhancements" Garcia also argues that the "sentence-mitigating benefits contemplated in section 1170.91 can equitably be extended to the gun use enhancements attached to his sentence." Thus, if Garcia were correct on the merits of either of these contentions, he would have been entitled to a remand to permit the trial court to strike one or more of the gun use enhancements. Under these circumstances, we conclude that the trial court's order denying his motion for modification of sentence is appealable. (See *Teal v. Superior Court* (2014) 60 Cal.4th 595, 600 ["a postjudgment order 'affecting the substantial rights of the party' (§ 1237, subd. (b)) does not turn on whether that party's claim is meritorious,

III.

DISCUSSION

A. *Garcia is not entitled to a remand to permit the trial court to exercise its discretion to strike one or more of the firearm enhancements*

Garcia acknowledges that "[b]ecause [he] is serving a life sentence, he is ineligible for the relief provided military veterans under [s]ection 1170.91." However, he claims that "[u]pon receipt of [his] motion for resentencing, the court had discretion to strike one or more of the gun use enhancements attached to [his] sentence." Garcia also "proposes" that the "sentence-mitigating benefits contemplated in section 1170.91 can equitably be extended to the gun use enhancements attached to his sentence" and he "requests that this court remand the matter to the trial court so that he may request that the trial court exercise its discretion under section 12022.53 to strike one or more of the gun use enhancements."

1. *Governing law*

a. *Section 1170.91*

Section 1170.91, subdivision (a) provides that the trial court shall consider certain circumstances to be factors in mitigation when imposing a term under section 1170, subdivision (b) on a member or former member of the United States military. The statute provides:

but instead on the nature of the claim and the court's ruling thereto"]; see also *id.* at p. 601 ["The test of appealability under section 1237, subdivision (b), does not depend on the resolution of 'an issue to be determined on the merits' ".])

"(a) If the court concludes that a defendant convicted of a felony offense is, or was, a member of the United States military who may be suffering from sexual trauma, traumatic brain injury, post-traumatic stress disorder, substance abuse, or mental health problems as a result of his or her military service, the court shall consider the circumstance as a factor in mitigation *when imposing a term under subdivision (b) of Section 1170*. This consideration does not preclude the court from considering similar trauma, injury, substance abuse, or mental health problems due to other causes, as evidence or factors in mitigation." (Italics added.)

Section 1170.91, subdivision (b) permits a person "*to request resentencing pursuant to subdivision (a)*," (italics added) as follows:

"(b)(1) A person currently serving a sentence for a felony conviction, whether by trial or plea, who is, or was, a member of the United States military and who may be suffering from sexual trauma, traumatic brain injury, post-traumatic stress disorder, substance abuse, or mental health problems as a result of his or her military service may petition for a recall of sentence, before the trial court that entered the judgment of conviction in his or her case, to request resentencing pursuant to subdivision (a) if the person meets both of the following conditions:

"(A) The circumstance of suffering from sexual trauma, traumatic brain injury, post-traumatic stress disorder, substance abuse, or mental health problems as a result of the person's military service was not considered as a factor in mitigation at the time of sentencing.

"(B) The person was sentenced prior to January 1, 2015. This subdivision shall apply retroactively, whether or not the case was final as of January 1, 2015.

"(2) If the court that originally sentenced the person is not available, the presiding judge shall designate another judge to rule on the petition.

"(3) Upon receiving a petition under this subdivision, the court shall determine, at a public hearing held after not less than 15 days' notice to the prosecution, the defense, and any victim of the offense, whether the person satisfies the criteria in this subdivision. At that

hearing, the prosecution shall have an opportunity to be heard on the petitioner's eligibility and suitability for resentencing. *If the person satisfies the criteria, the court may, in its discretion, resentence the person following a resentencing hearing.*" (Italics added.)

b. *Section 12022.53, subdivision (h)*

Section 12022.53, subdivision (h) provides:

"The court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section. The authority provided by this subdivision applies to *any resentencing that may occur* pursuant to any other law." (Italics added.)

2. *Application*

As Garcia acknowledges, by its plain language, section 1170.91 applies only to terms imposed under section 1170, subdivision (b), i.e., *determinate* terms.

Indeterminate terms, such as the one Garcia is serving for second degree murder, are imposed under section 1168, subdivision (b). (*People v. Felix* (2000) 22 Cal.4th 651, 655, see also *id.* at p. 659 ["sentences of some number of years to life are indeterminate sentences not subject to the DSA [determinate sentencing act, section 1170 et seq.]"].) Therefore, as Garcia acknowledges, he is "ineligible for the relief provided military veterans under [s]ection 1170.91."

Nevertheless, citing section 1170.91, subdivision (b)(3), Garcia contends that "at a resentencing hearing made possible by [his] petition under section 1170.91, the trial court could use its discretion under section 12022.53, subdivision (h), to strike any or all of the three gun use enhancements attached to appellant's sentence." We disagree.

Section 1170.91, subdivision (b)(3)⁷ authorizes the trial court to hold an *eligibility* and *suitability* hearing, and then, if the trial court finds the defendant eligible and suitable for resentencing, to hold a separate *resentencing* hearing. Since, as Garcia acknowledges, he is not *eligible* for resentencing under section 1170.91, the trial court was not authorized to conduct a resentencing hearing for any purpose. Since no resentencing hearing was authorized, the trial court lacked any authority to strike any of Garcia's firearm enhancements pursuant to section 12022.53, subdivision (h). (*Ibid.* ["The authority provided by this subdivision applies to *any resentencing that may occur* pursuant to any other law" (italics added)].)

Finally, Garcia argues that the sentence mitigating benefits of section 1170.91 may "equitably be extended," so as to permit the striking of the firearm enhancements attached to his sentence. Garcia provides no legal argument in support of his contention that this court may effectively rewrite the terms of the applicable statutory schemes to provide the result that he seeks, and we are not aware of any such authority. (Cf. *Ghory v. Al-Lahham* (1989) 209 Cal.App.3d 1487, 1492 ["Principles of equity cannot be used to

⁷ As noted *ante*, section 1170.91, (b)(3) provides:

"Upon receiving a petition under this subdivision, the court shall determine, at a public hearing held after not less than 15 days' notice to the prosecution, the defense, and any victim of the offense, whether the person satisfies the criteria in this subdivision. At that hearing, the prosecution shall have an opportunity to be heard on the petitioner's *eligibility and suitability* for resentencing. If the person satisfies the criteria, the court may, in its discretion, resentence the person following a *resentencing* hearing." (Italics added.)

avoid a statutory mandate"].) Thus, we decline Garcia's request to "equitably . . . extend[]" the sentencing-mitigating benefits of section 1170.91 to authorize the trial court to strike Garcia's firearm enhancements.

Accordingly, we conclude that the trial court properly denied Garcia's motion and we deny his request for a remand.

IV.

DISPOSITION

The April 4, 2019 order denying Garcia's motion for modification of sentence is affirmed.

AARON, J.

WE CONCUR:

McCONNELL, P. J.

DATO, J.